Missouri Portland Cement Company *and* Charles R. Johnson. Case 14–CA–20263

March 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On April 24, 1990, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent filed exceptions and a supporting memorandum. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

The judge found that Respondent violated Section 8(a)(1) of the Act when it told Charles Johnson that he was not considered for the job of material handler because he was ''talking unionism,'' and that it violated Section 8(a)(3) and (1) when it failed to consider Charles Johnson for the job because of this reason. This failure to consider was accomplished by excluding Johnson's name from the list of employees from which the final choice was to be made. The judge discredited the documents and witnesses that the Respondent alleged would provide a lawful explanation for this omission. To remedy the Respondent's unlawful failure to consider Johnson, the judge ordered the Respondent to hire Johnson and make him whole because it failed to establish that it would not have hired him absent his union activities.

The Respondent excepts, inter alia, to the judge's order requiring it to hire Johnson and make him whole. It contends that the remedy, if any, should be limited to an order to consider Johnson for employment. It argues that at most the evidence shows only a failure to consider Johnson for the position in question and that ''the only damage Johnson allegedly suffered was that his name was not placed on the list.'' In support of this contention, the Respondent refers, inter alia, to the testimony of Douglas Burton, the official of the Respondent who made the final choice. Burton testified that even if Johnson had been on the list Burton would have rejected him because of Johnson's poor attitude. Burton testified that his opinion had nothing to do with Johnson's union affiliation.

However, Burton's testimony is suspect because of an incident that occurred prior to the Respondent's unlawful conduct.[2] While Burton was running for reelection to the school board, Johnson placed in the newspaper a union advertisement supporting Burton's opponents. Burton testified that in recommending Johnson to another employer he had some reluctance as a result of this incident. Given this attitude, as well as the Respondent's unlawful conduct, it is questionable whether an order merely requiring the Respondent objectively to consider Johnson for employment would be adequate to remedy the Respondent's unfair labor practices. In any event, where a respondent's discriminatory decision creates doubt as to whether a discriminatee would have been hired, that doubt must be resolved against the wrongdoer. See generally *State Distributing Co.*, 282 NLRB 1048 (1987).[3] We find the judge's remedy fully appropriate.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Missouri Portland Cement Company, Joppa, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Additionally, the Respondent asserts that the judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

We correct the judge's statement that R. Exh. 2, used to evaluate employees, provided ratings based on a scale of two to eight. We note that one employee rated in that exhibit received a nine. We also correct the judge's finding that R. Exh. 2 was prepared shortly after the plant reopening. We find instead that it was prepared shortly after the announcement that the plant would reopen. These minor errors of the judge do not otherwise affect the validity of his decision.

[2] Member Cracraft does not rely on the rationale in this paragraph. She notes that in sec. III, C of his decision, the judge fully considered Burton's testimony that he would not have hired Johnson even if he had been on the list of five applicants supplied by Production Supervisor Robertson because of Johnson's ''bad attitude.'' Member Cracraft also notes that Robertson similarly testified that Johnson had a poor attitude, but the judge explicitly discredited Robertson's entire testimony. Finally, Member Cracraft observes that the judge concluded as follows in the last paragraph of his decision: ''Although [the Respondent] now seeks to show [that] Johnson . . . is such a poor employee that he would not have been hired for the material handler position even if he had not engaged in protected conduct, I find it has not sustained its evidentiary burden.''

[3] We note that evidence militating against any conclusion that Johnson would not have been hired had he been considered in a nondiscriminatory fashion includes evidence that he had prior experience as a material handler and that during approximately 7 years of employment with the Respondent before its temporary shutdown in 1986 and reopening as a nonunion operation in 1987, he had been promoted to a series of increasingly more skilled jobs.

Lucinda Morris, Esq., for the General Counsel.

Michael S. Mitchell, Esq. (McGlinchey, Stafford, Mintz, Cellini & Lang, P.C.), of New Orleans, Louisiana, and *Michael Riley, Esq.*, of Davenport, Iowa, for the Respondent.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On a charge filed by Charles R. Johnson on August 18, 1989,[1] the Regional Director for Region 14 of the National Labor Relations Board issued a complaint on October 3 which alleged, in substance, that Missouri Portland Cement Company (the Respondent)[2] engaged in conduct which violated Section 8(a)(1) and (3) of the National Labor Relations Act during the month of August by telling an employee he had not been considered for employment because he engaged in union activity, and by failing to consider Charles R. Johnson (Johnson or the Charging Party) for employment because he engaged in union and/or protected concerted activities. Respondent filed timely answer denying it had engaged in the unlawful conduct alleged in the complaint, and thereafter filed a Motion for Summary Judgment which was denied.

The case was heard in St. Louis, Missouri, on December 12, and all parties appeared and were afforded full opportunity to participate. On the entire record, including posthearing briefs filed by the parties,[3] and from my observation of the demeanor of the witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation authorized to do business in Illinois, maintains a production facility in Joppa, Illinois, where it is engaged in the manufacture, nonretail sale, and distribution of cement and related products. During the 12-month period ending August 31, 1989, it sold and shipped materials valued in excess of $50,000 from its Joppa plant to points located outside the State of Illinois. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that Local D-438, United Cement, Gypsum and Lime Workers Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union commenced to represent all production and maintenance employees at the Joppa plant in 1963. After expiration of the 1981–1984 collective-bargaining agreement covering such employees, the Union called an economic strike. During the strike, permanent replacements were hired, and when it ended, the Charging Party was one of the employees who was not recalled to work. At some point in 1986, the plant was closed. It was reopened by the instant Respondent in April 1987. Thereafter, the Union filed charges in Cases 14–CA–18948 and 14–CA–19048 alleging, inter alia, Respondent had violated Section 8(a)(1), (3), and (5) of the Act by refusing to meet and bargain with the Union in regard to the 1987 rehire and recall of employees, and/or that it had failed and refused to recall employees on the preferential hiring list because of their activity on behalf of the Union and/or concerted activity. Both charges were dismissed.[4] The Union appealed the dismissal of the above-described charges, and by letter dated June 2, 1988, the General Counsel denied the appeal.[5]

B. *General Counsel's Case*

Alleged discriminatee Johnson was employed at Respondent's facility from January 1978 until he was permanently replaced during the June 1984 strike. He held the following positions during the period described: laborer (3–4 months); material handler (2 years); equipment operator (2 years); utility operator (2 years); and he successfully bid and was awarded a control operator position shortly before the strike. He was never trained on the last mentioned job because he participated in the strike. In addition to progressing to more skilled and higher paying jobs during his tenure of employment, the employee received a commendation for ''special effort'' as a result of his performance during a pan conveyor malfunction in September 1983.[6] At the time of the above-mentioned strike, Johnson was earning $13.67 per hour.

Johnson has been a member of the Union since 1978. Since 1987, he has been the Union's recording secretary, and has held a production steward position.

Shortly after Respondent reopened the facility in April 1987, Johnson applied for a utility operator position. He was informed by letter that there were no openings. During the summer of 1988, he again applied for a utility operator position in response to a newspaper ad. He was not hired for the position.

During the fall of 1988, Dickie Lewis, a Respondent foreman, indicated to Johnson that he was almost positive he could cause Respondent to hire him as a material handler. Several days later, Lewis informed the employee the material handler job had ''fell through,'' and he asked if Johnson would be interested in a foreman job with Defender Industries, a laborer contractor used by Respondent to keep the facility clean. When Johnson exhibited interest, Lewis told him he would have to obtain Robbie Robertson's okay; that he would attempt to obtain it by having Doug Burton, Respondent's distribution manager, talk to Robertson at a coming company dinner. A short time later, Lewis informed Johnson he had been approved for the Defender foreman position by Robertson. Thereafter, Defender official Charles Holt interviewed Johnson and informed him at the end of the interview that he would recommend to the Mount Vernon headquarters that Johnson be hired. After the matter was submitted to Mount Vernon, Johnson was denied the foreman's job for the stated reason that that office did not feel one should be hired off the street for the position. Holt then offered, and Johnson

[1] All dates herein are 1989 unless otherwise indicated.

[2] Although the complaint designates the Respondent to be Missouri Portland Cement, the record reveals Respondent's correct name is Missouri Portland Cement Company.

[3] Respondent submitted a request for permission to file a reply brief and a reply brief dated January 30, 1990. In the absence of opposition by counsel for General Counsel, the request is granted. Respondent's motion to correct transcript, which is unopposed, is granted.

[4] See R. Exhs. 3 and 4.

[5] See R. Exh. 5.

[6] See G.C. Exh. 5.

accepted, a laborer position with Defender at the Respondent's facility.

Johnson testified that, on his first day at the facility as a Defender employee, he thanked Max Frailey, Respondent's plant manager, and Burton, for giving him a chance to come back. He testified he told both of them that, even though he was still a member of the Union and the plant was nonunion, they would have no trouble out of him.

Subsequently, Johnson learned in the late spring of 1989 that another utility operator opening existed. He applied for the job and was interviewed by Greg St. Clair, Respondent's production manager, and by Robert (Robbie) Robertson, its production supervisor. He testified St. Clair acknowledged during the interview that he was qualified for the job, but he heard nothing further after the interview. The employee testified that in late June, when he encountered St. Clair, he asked why he had not gotten the job. St. Clair told him he knew he was qualified for the job and could do it, but in making their decision they looked at ability, effort, and attitude to see if one fit into their group. Johnson asked if what he really meant was did he fit into their nonunion plant. St. Clair responded by stating I did not say that, and Johnson rejoined, ''no, but you meant it.''

In late July or early August 1989, Johnson learned from Respondent employees that a material handler position was open. He applied for the position but heard nothing. On August 8, he claims he telephoned Doug Burton to inquire what it took to get an interview. He testified Burton told him he had asked Robbie Robertson for a list of his five best Defender employees and his name was not on the list. When Johnson asked why, Burton told him he did not know; that he would have to ask Robbie; and that he needed Robbie and Greg St. Clair to get a job at Respondent.

On August 10, Johnson approached Robertson on the burner floor. His account of the incident was as follows (Tr. 28–30):

> A. I walked up, I asked Robbie, I said why wasn't my name on the list of the five people you gave Doug Burton and he said do you really want to know and I said yes, I'd really like to know. He said was you or was you not talking unionism in the kiln on the last brick job. I looked at him and I said what. He said I was told by three people that you were talking unionism in the kiln on the last brick job.
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> I said if you mean telling a bricker that we used to do our own brick work until the company contracted it out, then the union had to file a grievance and was awarded back pay—unionism, I said, yes, I said that. He said, yeah, that's another thing. You all were too lazy to do the work but you wanted the pay. I said, Robbie, I said I was a equipment operator at the time and I didn't get a cent of that money. He said you all got four times your regular wages on overtime, on a call-out you get four hours call-out and maybe work 15 minutes and go home with four hours pay. And that was a bunch of bull.
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> He said they shut this plant down and I lost my job because of the union. I said you mean to tell me the union was the only one at fault in all this trouble. He said no, the plant was partially at fault; he said but you're not going to talk unionism in my plant. He said if you want to talk unionism, you go home or you go to the tavern or back to Joppa, but you're not going to talk unionism in my plant.
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> I looked at him and I said I've always respected you and you've always been truthful with me, but I said respect's something you got to earn, you know, and I said you've lost all that from me. He said, Johnson, he said my opinion of you has fallen drastically since I've heard you was talking unionism and he said that's why your name wasn't on that list. He said my advice to you if you want a job at this plant is keep your nose clean and keep your mouth shut about the union.
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> I looked at him. I said, well, I finally know. I said I've always known something was wrong, why I wasn't getting rehired, and I said now you told me.
>
> Q. And did Robertson have any kind of response?
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> A. No. That was the end of it and we walked away.

Johnson acknowledged during his testimony that he received three written warnings while he was employed by Respondent. One was for parking in a restricted area at the plant; a second was for denting and bending an overhead door while operating a fork truck; and the third was issued when he tore some railroad track out of the ground while operating a bulldozer. The record reveals the described written warnings were received by the employee during or before the year 1982. Johnson claimed he received no oral or written warnings during his tenure as a Defender employee. He described himself to be an average to above-average employee.

C. *Respondent's Case*

Respondent presented its defense through testimony given by plant manager, Max Frailey; distribution manager, Douglas Burton; production supervisor, Robert Robertson; Defender foreman, Vance Sexton; and by offering in evidence certain documentary evidence which is discussed, infra.

Frailey testified the plant was operated with approximately 118 hourly employees and 4 salaried people in 1984, but it now operates as a nonunion plant with a total employment of 108 salaried employees. He signified that housekeeping and janitorial work is currently accomplished by approximately 18 laborers furnished by Defender, and that rebricking of its kilns is normally performed by outside contractors. Although Frailey has the final authority with respect to the hire of employees, he indicated his department heads actually interview applicants and thereafter recommend the hire of individuals to him. He stressed the fact that since reopening the plant, Respondent has pursued a teamwork concept and has sought to hire persons who fit into such a concept.

Through Frailey, Respondent placed in evidence as Respondent's Exhibit 1 a listing of employees hired since the plant was reopened. Single asterisks placed opposite the names of some employees on the list indicate such employees were former members of the Union.[7] Double asterisks placed after the names of 30 other employees indicated they were formerly members of unions other than Local 438.[8] Frailey testified that among those former union members hired were Jack Mizell, the union president at the time the

[7] Some 42 of a total of 122 were former members of Local 438.

[8] Some 10 of a total of 122 hired were former members of a union other than Local 438.

plant was closed; Roger Bornhill, formerly vice president of the Union; and T. J. Pryor, a former member of the Union's negotiating committee.

Frailey indicated during his testimony that while he had not directly supervised Johnson when he was previously employed by Respondent, he was generally familiar with the employee. He testified he was aware Johnson had applied for reemployment, and stated he was not hired because he did not feel Johnson would be a willing worker who would fit into the teamwork concept. In support of his claim, he identified a 13-page document which purports to rate employees on the payroll immediately prior to the time Respondent ceased to operate the plant in 1986. Frailey indicated he and Jack Hearn, Respondent's vice president of industrial relations, prepared the document, which was introduced as Respondent's Exhibit 2, by going through the personnel files of each former employee and noting absenteeism, accidents, and disciplinary warnings. Employees were given ratings varying from 2 (poor) to 8 (good), with 5 being average. With regard to Johnson, the document noted: his birth date; his hire date of January 9, 1978; an absence incident rate of 15; total absenteeism of 176-1/2 hours; no accidents; disciplinary action consisting of parking and work habit violations; that he was a high school graduate and was an equipment operator; that he was rated a 4; and comments indicated ''poor skills, lacks ambition, attitude poor.''[9] Frailey indicated the exhibit under discussion was prepared shortly after the plant was reopened, and that he spent several days explaining the document to Board personnel to refute union charges that Respondent had refused to rehire former employees because of their union activities or sentiments.[10]

Respondent's distribution manager, Burton, testified that when Johnson was employed by Respondent as a material handler during the 1980–1982 period, the employee worked under his supervision. He claimed that when Johnson worked for him he did his work, but had a bad attitude and would mope around without speaking when he got mad.

Burton acknowledged that when a material handler vacancy occurred in August 1989, he instructed Robertson to give him a list of his five best Defender Industries workers so he could fill the vacancy with a laborer already working at the facility. He indicated he assigned the task to Robertson because he was not familiar with the Defender employees while Robertson was as he coordinated activities between Defender and Respondent. Burton testified he interviewed the five employees subsequently named by Robertson and chose Darrell Logeman for the position. He testified that attitude is the most important factor he considers when deciding whether to hire an individual, and that he was influenced in his selection of Logeman because a close friend who had previously employed Logeman described him as the best man he had before he went with Defender, and he determined his attitude was good.

During his testimony, Burton indicated Johnson called him two or three times after the plant was reopened in an attempt to seek employment. He claims Johnson told him he had changed and was a different person as he had become a family man with a lot of responsibilities; that he wanted a job, and would do him a good job if hired. He acknowledged that when Johnson originally sought employment with Defender, he, at Dick Lewis' request, discussed the matter with Frailey and Robertson and thereafter spoke with Defender official Charles Holt and encouraged him to interview Johnson and give him a chance with Defender. With respect to the Johnson-Defender situation, Burton testified he recommended Johnson to Defender only after some soul searching because he ran for reelection to the school board in 1987, and during the campaign Johnson, acting on behalf of the Union, placed an ad in the newspaper which supported his opponents.

When Burton was asked whether he would have hired Johnson for the material handler position if he had been on the list of five (5) given him by Robertson, he responded by stating (Tr. p. 74):

> THE WITNESS: No, I wouldn't.
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> Q. (By Mr. Beiser) Why not?
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> A. When Charley worked for me before, he was the type of person that, if anything went wrong, then he had a bad attitude, he was mad. I'm not saying he didn't do his work, but he would be—wouldn't speak, mope around, you know; and we need—I felt like we needed someone, especially at the river, with a positive attitude. We have a—we work around the clock and of 21 eight hour shifts, we cover only 12 of those. So our people have to work without supervision a big part of the time. So attitude is very important to me.
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> Q. And you did not feel that Mr. Johnson had the proper attitude for that position?
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> A. No.
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> Q. Did your opinion have anything to do with Mr. Johnson's union affiliation?
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> A. No.
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> Q. Prior to this morning when you heard Mr. Johnson testiiy, did you have any idea that he was an officer of the union.
>
> A. No, I did not.

Robert (Robbie) Robertson has, with exception of the year the plant was closed, been employed in a supervisory capacity at Respondent's facility since 1963. When Johnson worked there from 1978 to 1984, Robertson was the general foreman in the plant. He testified that during the time he was employed Johnson was not a willing worker, had a poor attitude, and was careless when operating equipment.

Like Burton, Robertson indicated during his testimony that Johnson telephoned him several times after the plant was reopened to seek reemployment at the plant. He testified the employee told him he had gotten married, had a little girl, had changed, and wanted and needed a good job.

Robertson acknowledged during his testimony that Burton approached him about recommending Johnson for employment at Defender. He claimed, however, that he recommended Johnson for a laborer job rather than a foreman's position, and he indicated he told Defender official Holt that Johnson ''was not too good a worker for me . . . he's got some recommendations here from the plant, he does know the plant . . . why don't you just take a look at him and then it's up to you.''

According to Robertson, his observation of Johnson during his first 3 months with Defender caused him to conclude

[9] Of the individuals named in R. Exh. 2, 60 were rated 4 or lower. The total number of names set forth in the exhibit is 160.

[10] See Regional Director's letters dismissing charges filed in Cases 14–CA–18948 and 14–CA–19048, and General Counsel's denial of appeal. R. Exhs. 3, 4, and 5.

Johnson had changed and he was wanting to work. He claims that thereafter, however, Johnson fell back into the same category he was in prior to 1984; that he would catch him off the job in the storeroom or talking in the shop when he should be working. In addition, he testified Johnson worked compulsory overtime, but would not work overtime voluntarily. Finally, Robertson claimed that Vance Sexton, Defender's foreman at the facility, complained about Johnson, indicating other employees did not like to work with him because he would not do his fair share of the work.

With respect to preparation of the list of five Defender employees, Robertson testified he chose the five Defender employees he considered to be their best employees and handed the list to Burton without commenting on the employees. He indicated he considered Logeman to be Defender's best laborer.

While Robertson acknowledged that Johnson approached him on the burner floor to ask why his name was not on the list of persons to be considered for the material handler position, his account of their conversation is markedly different from Johnson's. He claimed that he responded to Johnson's inquiry by informing him he believed him to be disruptive to the work force. He testified Johnson wanted him to define ''disruptive'' and he told him that while working on a brick job, he had started talking unionism to all the people working on the job to the point that he had shut the job down that particular night for a period of time.[11] Robertson claims Johnson sought at that point to convince him that employees had asked him about the Union; that he was not interested in what they were talking about and that he did not attend union meetings and had no interest in union activities. Robertson claims he concluded the conversation by telling Johnson he was not interested in his union activities on his own time, or at work if he continued to work while talking, but that he was disruptive when he got the job shut down. He denied he made the remarks attributed to him by Johnson. Robertson admitted he did not recommend to Defender that Johnson be given a written warning for being disruptive on the job.

Respondent's final witness was Vance Sexton, Defender Industries' labor foreman at Respondent's facility. Sexton apparently obtained the foreman position which Johnson, with Respondent's recommendation, sought before he was hired as a Defender laborer in October 1988. Sexton claimed during his testimony that Johnson had exhibited some animosity toward him during the first 3 months of his (Johnson's) employment, indicating his impression was that Johnson felt he did not know as much as he because he was younger.

The record reveals Sexton provides direct supervision of the 18 laborers and 2 janitors which Defender utilizes at Respondent's facility. Each afternoon at 3 p.m., he and Respondent Production Supervisor Robertson confer to determine what work the Defender laborers will perform the next day.

Sexton testified he monitors the attendance and work-related deficiencies of his employees by maintaining an absentee calendar on each employee. The 1989 Absentee Calendar maintained on Johnson was placed in the record as Respondent's Exhibit 6. The first page of the exhibit reveals Johnson had taken 4 sick days and 1 personal day prior to the date the hearing was held in the instant case. The reverse side of the document purports to indicate, inter alia, that Johnson piled debris where he was told not to pile it on December 12, 1988; that he conversed with Respondent personnel for 30 minutes when he should have been working on June 27, 1989; that the employee consistently turns down overtime (notation dated Aug. 16, 1989); that Johnson was not working on several occasions while on a roof on October 31, 1989; and that Johnson was observed talking for about 10 minutes when he should be working on December 7, 1989.[12]

When he was asked how he would rate Johnson as compared to his other employees, Sexton said he would place Johnson in the ''lower bottom half.'' He indicated other employees have informed him they do not want to work with Johnson because he is slow and he irritates them. To avoid the problem, he indicated he rotates his work crews, which normally consist of two employees. Significantly, although he indicated he felt Johnson had failed to perform satisfactorily on occasion, he admitted he has never disciplined the employee or given him a written warning.

While Sexton indicated he has advised Robertson of Johnson's shortcomings, he failed to indicate what, if anything, he told Robertson about Johnson prior to the time the material handler position was filled in late July or early August.

Analysis and Conclusions

The first issue which must be decided in this case is whether Production Supervisor Robertson told Johnson on or about August 10, 1989, that he had not been considered for employment because of his union activity. Patently, the credibility issue raised by the conflicting testimony given by Johnson and Robertson must be resolved.

Without hesitation, I credit Johnson. The employee was by far the most impressive witness who appeared before me in this case. He testified in a straightforward manner, did not seek to embellish his testimony, and, when he was cross-examined, he exhibited no tendency to seek to evade counsel's inquiries. Moreover, the remarks he attributed to Robertson are remarks one in the production supervisor's position could logically be expected to utter in the setting revealed by the record.

Robertson, on the other hand, was the most unbelievable witness who appeared before me in this case. He was particularly evasive when cross-examined concerning the significance of the commendation he issued to Johnson, and the recommendation he made to Defender when it had a foreman opening at the plant. Although Robertson gave testimony in a forceful manner, I gained the impression when listening to him that he was not being candid. I find to be particularly unbelievable his assertion that Johnson told him on August 10 that he did not attend union meetings and was not interested in the Union as the record reveals Johnson is the Union's recording secretary. I conclude Robertson sought to tailor his testimony to meet the needs of Respondent's defense.

In sum, I find that on August 10, 1989, Robertson made each of the comments employee Johnson attributes to him. I expressly find that he informed the employee during their

[11] Robertson claimed Foreman Allen Brown informed him Johnson was disruptive when working in a kiln which was being rebricked. Brown was not called as a witness.

[12] Sexton failed to explain why he had noted the 1988 deficiency on a 1989 calendar.

conversation that he was told by people that Johnson had been talking unionism in the kiln; that the employee was not going to talk unionism in his plant; that his name was not on the list because he had heard he was talking unionism; and that, if he wanted a job at the plant, he should keep his nose clean and keep his mouth shut about the Union. Accordingly, I find, as alleged, that Respondent, through Robertson's described remarks, violated Section 8(a)(1) of the Act as alleged.

I turn now to consideration of paragraph 6 of the complaint, which alleges, in substance, that Respondent failed and refused to consider employee Johnson for employment in early August 1989 because he engaged in union or other protected concerted activities.

The facts, supra, reveal: that Johnson had held the position of material handler for approximately 2 years while employed by Respondent prior to the 1984 strike; that Respondent management recommended that Defender Industries employ him at a time when it needed a foreman; that the employee applied for a material handler position in July 1989; that the material handler vacancy was filled by the hire of Defender laborer Logeman, who had no prior experience as a material handler; and that Respondent production supervisor informed Johnson he was not considered for the position of material handler because he had been talking unionism within Respondent's plant. By establishing the facts set forth, I find that General Counsel has established, prima facie, that Johnson's participation in protected conduct was a motivating factor in Respondent's decision to refuse to consider him for employment as a material handler. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982).

Respondent contends the instant record establishes that it would have refused to consider and/or hire Johnson for the material handler position even in the absence of his participation in protected conduct. In particular, it relies on the rating assigned him when Frailey and Hearn prepared Respondent's Exhibit 2; the treatment experienced by Johnson when he applied for positions other than the material handler position; the testimony of Robertson and Sexton offered to show Johnson was a poor employee; and the documentary evidence (Employee Calendar) offered to support Sexton's testimony. Finally, Respondent contends ''Johnson's charge is res judicata'' because the Board ruled in Cases 14–CA–18948 and 14–CA–19048 ''that Charles Johnson (among others) was not hired because he was not among the most qualified applicants in the opinion of Max Frailey.''

I shall treat the res judicata contention first. Patently, it is without merit because the action taken in the named unfair labor practice cases identified above was action taken by the General Counsel, not action taken by the Board after a hearing on the merits had been conducted.

Turning to Respondent's Exhibit 2, I note, at the outset that employees were rated on a scale of 2 to 8 rather than a scale of 1 to 10 as contended by Respondent in its brief. Second, I note that Respondent arbitrarily chose to call employees with a rating of 5 average employees, rather than according that designation to employees with a median rating of 4. Third, the document reveals Respondent, in effect, rated in excess of one-third of its prestrike employees as unsatisfactory employees.[13] Fourth, it is readily apparent that subjective, in addition to objective, factors were considered in arriving at an employee rating, i.e., ''attitude'' appraisal. In this connection, it should be noted that while commendations received by some employees were considered, the 1983 commendation received by Johnson was not noted or considered.

The above-noted factors, considered in conjunction with Frailey's admission that he had not personally supervised the work of employees he and Personnel Director Hearn rated, cause me to conclude the exhibit is a self-serving document which is entitled to little weight.

Similarly, in the absence of evidence which would reveal, in some detail, why Johnson was not hired to fill positions he sought prior to the time he sought the material handler position under discussion, I am unwilling to presume, as Respondent contends, that the employee was not chosen because he did not have the qualifications required of one seeking those positions. Indeed, when he was interviewed for a utility operator position in June 1989, St. Clair expressly told him he was qualified to perform the work.

Careful consideration of Robertson's and Sexton's testimony, which was to the effect that Johnson has been an unsatisfactory Defender employee, fails to convince me that Johnson's performance as a Defender employee was so outrageously bad as of late July or early August that it can be relied on by Respondent to justify its refusal to consider or hire Johnson for the material handler position. Robertson's claim that he considered Johnson to be a poor employee is entitled to little weight because he made no mention of Johnson's shortcomings when he told him why he had not been considered for the material handler position. To the contrary, he made it clear that the employee's discussion of unionism was his reason for failing to consider the employee for the job.

If Sexton's testimony were fully accepted at face value, it would establish that Johnson was a poor employee at the time the hearing was held in this case. When appraising his testimony, however, I have viewed it realizing he is a young man anxious to please, and his success or lack of success in his present assignment is largely dependent on performing in a manner which pleases Robertson. As revealed by the record, Sexton evidently placed Johnson under rather close scrutiny at some point, and he thereafter reported the employee's deficiencies to Robertson. He failed to indicate with any precision, however, what he had said to Robertson about this employee prior to the time Robertson conversed with the employee on August 10, 1989. In several respects, I find his testimony, as well as the absentee calendar he kept on Johnson to be suspect. Thus, during his testimony, he ambiguously, without providing illustrative details, stated Johnson was ''disruptive.'' Significantly, Robertson made the same claim and I do not credit that portion of his testimony which relates to an alleged shutdown and/or disruption of kiln work. Moreover, while the absentee calendar placed in the record as Respondent's Exhibit 6 purports to be a record of 1989 attendance and work-related incidents, I note that, for some unexplained reason, Sexton referred to a 1988 ''klinker'' incident on the document. Further, although his testimony revealed Defender employees are not required to

[13] Of the 160 employees listed on the exhibit, 60 were rated 4 or below. None of the 60 rated 4 or below have been rehired by Respondent.

work overtime except when assigned to kiln rebricking work, he noted in his testimony and on the calendar that Johnson ''consistently turns down overtime.'' Robertson made the same point when he testified.

Noting that Sexton has admittedly not spoken to Johnson about his alleged shortcomings and that he has not disciplined the employee in any way, I conclude I cannot accept his testimony or the remarks he noted on Respondent's Exhibit 6 at face value. I am convinced he tailored his testimony to a marked extent to fit the needs of Robertson's and Respondent's defense.

In sum, the instant record reveals Respondent management recommended Johnson to Defender when it was seeking to hire a foreman in late 1988. Thereafter, it indicated it continued to consider him to be a viable candidate for employment within its own organization, by interviewing him when an equipment operator position became available in late May or early June 1989. Two months later, when Johnson applied for a material handler opening, a position he had held for 2 years, Respondent hired a person with no prior experience and refused to consider Johnson because he had been talking unionism with other employees in its plant. Although it now seeks to show Johnson he is such a poor employee that he would not have been hired for the material handler position even if he had not engaged in protected conduct, I find it has not sustained its evidentiary burden. Accordingly, I find that employee Charles Johnson was denied employment as a material handler in early August 1989 because he engaged in union activity. By engaging in such conduct, Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Missouri Portland Cement Company is an employer engaged in conmerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling an employee he had not been considered for employment because he was talking unionism, and that he should keep his nose clean and his mouth shut about the Union if he wanted a job in its plant, Respondent violated Section 8(a)(1) of the Act.

4. By failing and refusing to consider an employee for employment because he engaged in union activity, Respondent violated Section 8(a)(1) and (3) of the Act.

5. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found Respondent unlawfully failed to consider employee Charles Johnson for a material handler position because he engaged in union activities, and having found that it failed to establish that it would not have hired him in the absence of his participation in protected conduct, I will recommend that it be required to immediately employ him as a material handler, or in a substantially equivalent position, and to make him whole for any loss of earnings or other benefits suffered by reason of the unlawful discrimination against him, with interest computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Missouri Portland Cement Company, Joppa, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening empoyees by telling them they will not be considered for empoyment or they will not be employed if they talk unionism at its plant.

(b) Refusing to consider applicants for employment because they express support for Local D-438, United Cement, Gypsum and Lime Workers Division of the International Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, AFL–CIO or any other labor organization.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Charles R. Johnson immediate employment as a material handler, or in a substantially equivalent position, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, with interest.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Joppa, Illinois facility copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations; Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten employees by telling them they will not be considered for employment or they will not be employed if they talk unionism at our plant.

WE WILL NOT refuse to consider applicants for employment because they express support for Local D-438, United Cement, Gypsum and Lime Workers Division of the International Division of the International Brotherhood of Boilermakers, Iron Ship Builders, Forgers and Helpers, AFL–CIO or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Charles R. Johnson immediate employment as a material handler, or in a substantially equivalent position, and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, with interest.

MISSOURI PORTLAND CEMENT COMPANY